EMPLOYMENT TRIBUNALS (SCOTLAND)

Case no 4110023/2019

Held at Edinburgh on 6 January 2020

Employment Judge: W A Meiklejohn

Mr Jacob Cohen	**Claimant** **In person**
Faculty Services Limited	**Respondent** **Represented by Mr D Hay, Advocate**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is as follows –

(i) The Tribunal has jurisdiction to hear the claimant's breach of contract claim except insofar as that claim relates to the breach of a contractual term imposing an obligation of confidence;

(ii) The claimant's claim of direct sex discrimination under section 13 of the Equality Act 2010 is not time barred; but

(iii) The claimant's said claim of direct sex discrimination is struck out in terms of Rule 37(1)(a) in Schedule 1 to the Employment Tribunals (Constitution and Rules of

Procedure) Regulations 2013 on the ground that it has no reasonable prospect of success; and

(iv) The claimant's application to strike out part of the respondent's response to his claim of unfair dismissal is refused.

REASONS

1. This case came before me for an open preliminary hearing. The claimant appeared in person and Mr Hay, instructed by Mr S Miller, Solicitor, appeared for the respondent.

2. The issues for determination at the preliminary hearing were identified in these terms –

   (i) Did the Tribunal have jurisdiction to hear the claimant's breach of contract claim?

   (ii) Was the claimant's sex discrimination claim time barred?

   (iii) Should the claimant's sex discrimination claim be struck out as having no reasonable prospect of success?

   (iv) Should parts of the respondent's response to the claimant's unfair dismissal claim be struck out as having no reasonable prospect of success?

Procedural history

3. On 13 August 2019 the claimant presented a claim to the Employment Tribunal in which he complained that (a) he had been unfairly dismissed by the respondent, (b) the respondent had breached his contract of employment and (c) the respondent had directly discriminated against him on the grounds of sex. The

claimant's particulars of claim, attached to his ET1 claim form, set out the basis of these complaints in considerable detail, extending to 51 pages and 325 paragraphs.

4. On 18 September 2019 the respondent submitted their response resisting these claims. In contrast to the claimant's particulars of claim, the respondent's grounds of resistance extended to 4 pages and 19 paragraphs. These did however make reference to (a) an investigation report which, including the appendices, extended to 127 pages, (b) the statement of reasons for dismissal extending to 11 pages and (c) the disciplinary appeal decision extending to 29 pages.

5. In their grounds of resistance the respondent raised two preliminary issues –

   (i) In respect of the claimant's breach of contract claim, the respondent argued that the Tribunal lacked jurisdiction because the claim related to *"a term imposing an obligation of confidence"* which was outwith the Tribunal's jurisdiction in terms of Article 5(d) of the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994 (the "1994 Order").

   (ii) In respect of the claimant's sex discrimination claim, the respondent argued that the act complained of, namely the suspension of the claimant but not his female comparator on 20 February 2019, was not a continuing act and accordingly the claim could not be considered by the Tribunal because it had been raised late and was out of time. This was in effect a reference to the time limit for presentation of claims in section 123(1) of the Equality Act 2010 ("EqA").

6. A preliminary hearing took place on 17 October 2019 (before Employment Judge Macleod). As explained in the Note issued after that hearing, the respondent's preliminary points could not be considered because this hearing was in private, having been listed for the purpose of case management at the time the notice of claim was sent to the respondent. The outcome of this hearing was that an open preliminary hearing was fixed for 6 January 2020 to deal with the respondent's

preliminary issues and also any application for strike out submitted by either party by 31 October 2019.

7. Applications for strike out were duly submitted by both parties as described briefly in paragraph 2 above.

8. In advance of the preliminary hearing the following applications and responses had been submitted to the Tribunal –

   (i) The respondent's application for strike out of the claimant's sex discrimination claim dated 31 October 2019.

   (ii) The claimant's application for strike out of part of the respondent's response to his unfair dismissal claim dated 31 October 2019 and their esto argument in response to his breach of contract claim.

   (iii) The claimant's application for an extension of time in relation to his sex discrimination claim dated 31 October 2019.

   (iv) The claimant's application for further and better particulars of the respondent's response to his sex discrimination claim dated 31 October 2019.

   (v) The claimant's responses to the respondent's preliminary issues dated 13 November 2019.

   (vi) The respondent's responses to the claimant's applications for (a) extension of time, (b) strike out and (c) further and better particulars dated 14 November 2019.

9. I also had a joint bundle of documents extending to 438 pages to which I will refer by page number.

Does the Tribunal have jurisdiction to hear the claimant's breach of contract claim?

10. Section 3 of the Employment Tribunals Act 1996 gave the power to confer jurisdiction on Employment Tribunals to deal with a claim for damages for breach of a contract of employment if the claim was such that a court in England and Wales or Scotland would under the law for the time being in force have jurisdiction to hear and determine an action in respect of the claim. By virtue of this power, the Employment Tribunal's jurisdiction was extended by the 1994 Order but with a number of exceptions set out in Article 5 of the 1994 Order.

11. So far as relevant Article 5 of the 1994 Order provides –

> "*This article applies to a claim for breach of a contractual term of any of the following descriptions* –
>
> *….(d) a term imposing an obligation of confidence….*"

12. The claimant's breach of contract claim was set out at paragraphs 244-267 of his particulars of claim (pages 49-53). He alleged that in speaking to Mrs R Cameron, a paralegal with a firm of solicitors, Mr G Clarke QC, the chair of the claimant's disciplinary hearing, had breached the respondent's disciplinary policy.

13. The respondent's disciplinary policy (pages 95-108) included the following statement at paragraph 4.4 under the heading "*Conducting the Hearing"* (at 101) –

> "*The proceedings, any statements and all documents and records relating to disciplinary hearings will be kept confidential."*

Submissions for respondent

14. Mr Hay referred to the formulation of the implied duty of trust and confidence in ***Malik v Bank of Credit and Commerce International SA (in compulsory***

liquidation) [1997] UKHL 23. It was a duty on both parties to the contract of employment not to "*without reasonable and proper cause, conduct itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between employer and employee".*

15. Mr Hay argued that this was not the same as a duty of confidentiality. He referred to ***Campbell v Frisbee [2003] ICR 141*** and ***Initial Services Ltd v Putterill [1968] 1 QB 396***. The "*obligation of confidence"* in Article 5(d) of the 1994 Order was closer to a duty of confidentiality than the term of mutual trust and confidence implied into every employment contract (and routinely relied upon in constructive dismissal claims). It had not been argued in ***Campbell*** that a duty of confidentiality was part of the obligation of mutual trust and confidence.

16. This was, Mr Hay submitted, a "*particular and focussed claim"* of breach by the respondent of an obligation of confidentiality and clearly fell outwith the Tribunal's jurisdiction by reference to Article 5(d) of the 1994 Order.

17. Mr Hay submitted that, if the respondent was wrong in its primary position that the Tribunal did not have jurisdiction to deal with the claimant's breach of contract claim, his esto position was that the claimant himself being in breach of contract, he could not enforce the alleged duty of confidentiality. Mr Hay referred to ***McNeill v Aberdeen City Council 2014 SC 335*** and in particular Lord Drummond Young at paragraph 22.

Submissions by claimant

18. The claimant described his breach of contract claim as *"niche"* to a specific point which, he argued, the respondent had misconstrued. He submitted that the respondent had breached express and implied terms of his contract of employment.

19. The express term was found at clause 13.2 of the claimant's contract of employment (77-94 at page 87) which provided –

"*You are subject to the Company's disciplinary rules and procedures and disciplinary appeals and grievance procedures, which will be provided to you but which do not form part of this Contract. Such disciplinary rules and procedures may be altered or added to from time to time and details of such alterations or additions will be given to you."*

20. The claimant argued that the respondent could not disregard this express term. There was mutuality of obligation to observe the disciplinary rules and procedures. A breach of clause 13.2 was not a breach of a term imposing an obligation of confidence. The obligation of confidentiality was "*one step removed"* which I understood to be a reference to the fact that it was found in the respondent's disciplinary policy rather than the claimant's contract of employment.

Reply for respondent

21. Mr Hay argued that it was not an answer to the clear limitation on the Tribunal's jurisdiction in Article 5(d) of the 1994 Order to draw a distinction between a rule in a policy and a clause in a contract. The 1994 Order covered claims for breach of the contract of employment. The term alleged to have been breached was either a term of the contract or it was not. The term could be found in any number of documents and the method of transcription (I suspect Mr Hay meant "*transposition"*) of the term into the contract was not important. Insofar as the claim was based on breach of an obligation of confidentiality, it could not survive the application of Article 5(d).

Discussion and disposal

22. Notwithstanding the statement in clause 13.2 of the claimant's contract of employment that the respondent's disciplinary rules and procedures did not form part of that contract, I considered that when the respondent invoked those rules and procedures it was a term of the claimant's contract that they (the respondent) would observe those rules and procedures. I would have had no difficulty in finding such a term to be implied but in fact there were express provisions to that effect.

23. The respondent's Disciplinary Procedure – Policy Number 07 (95-108) contained the following statements (at page 97) –

    - *"The following procedure will be applied fairly in all instances where disciplinary action is regarded as necessary by the organisation's management."*

    - *"The aim of this policy is to set out the employee and employer obligations and is designed to ensure that employees are dealt with fairly and consistently in disciplinary matters."*

    - *"This policy applies to all employees of the Faculty of Advocates and Faculty Services Limited including fixed term contract employees."*

24. I found that these statements carried the necessary implication that when invoking the disciplinary policy, the respondent was under a contractual obligation to comply with its terms. Those terms included the obligation of confidentiality quoted at paragraph 13 above.

25. I agreed with Mr Hay's submission that an "*obligation of confidence"* was akin to an obligation of confidentiality. If it meant the same or similar to "*trust and confidence"* then the exclusion from the jurisdiction of the Tribunal under Article 5(d) of the 1994 Order would have much wider effect. It would prevent an employee who was claiming constructive unfair dismissal on the basis of a breach of the implied obligation of mutual trust and confidence from pursuing a breach of contract claim.

26. I considered that the nature of the other terms excluded under Article 5 supported giving "*obligation of confidence*" a narrow interpretation. Those other terms relate to provision of living accommodation, intellectual property and covenants in restraint of trade. To use the claimant's language, these exclusions are "*niche"* as opposed to mainstream.

27. Accordingly my decision is that the Tribunal does not have jurisdiction to hear the claimant's claim of breach of contract so far as relating to the alleged breach of the respondent's obligation of confidentiality in paragraph 13.2 of their disciplinary procedure. However, for the reasons set out in the next two paragraphs, I did not consider that this necessarily disposed of the claimant's breach of contract claim in its entirety.

28. I raised at the hearing my view that the claimant's position as set out in his particulars of claim was that he had done nothing wrong and so, logically but not pled by the claimant, the respondent in dismissing him for gross misconduct had to be acting in breach of contract. At paragraph 233 of his particulars of claim (page 47) the claimant stated "*This was a case where there was a sufficiency of evidence….that established that the Claimant had not acted improperly at any time".* It seemed to me that this foreshadowed what might be described as a "*norma*l" breach of contract claim where the employee denies the alleged wrongdoing for which he was dismissed.

29. I invited the claimant to consider whether he wished to seek to amend his particulars of claim to express his breach of contract claim in this way. Mr Hay quite properly said that this was not something the respondent would be prepared to agree prior to seeing any such proposed amendment. I have expressed my Judgment in terms which anticipate that the claimant will seek to amend his breach of contract claim.

30. Rule 2 sets out the overriding objective of the Tribunal to deal with cases "*fairly and justly"* and provides that this includes, as far as practicable "*ensuring that the parties are on an equal footing*". I considered that it was consistent with the overriding objective to raise this matter.

Was the claimant's sex discrimination claim time barred?

31. Section 123 EqA provides as follows –

"*(1)….Proceedings on a complaint within section 120 may not be brought after the end of –*

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

(2)….

(3) For the purposes of this section –

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it…."

Submissions for respondent

32. Mr Hay referred to the section of the claimant's particulars of claim starting at paragraph 268 (page 53). He submitted that the act complained of was the respondent's suspension of the claimant (but not his comparator Ms J Boyd) on 20 February 2019. The claim form had been lodged with the Tribunal on 13 August 2019 and was out of time.

33. Mr Hay accepted that the respondent had taken further steps – they had conducted an investigation, taken disciplinary action and dismissed the claimant – which they had not taken against Ms Boyd. Referring to ***Barclays Bank plc v Kapur and others [1991] ICR 208***, Mr Hay said there was an important distinction between an act with continuing consequences and a continuing act. Each of the steps taken by the respondent after the act of suspension had been a separate act involving a separate mental process.

34. Mr Hay sought to distinguish the present case from ***Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96*** and ***Hale v Brighton & Sussex***

University Hospitals NHS Trust UKEAT/0342/16. While not specifically referred to by Mr Hay, I consider it appropriate to quote from these cases.

35. In ***Hendricks*** (at paragraph 52) the Court of Appeal said –

> "….*the focus should be on the substance of the complaints that the Commissioner was responsible for an ongoing situation or a continuing state of affairs in which female ethnic minority officers in the Service were treated less favourably. The question is whether that is "an act extending over a period" as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed."*

36. In ***Hale*** (at paragraphs 41-42) the Employment Appeal Tribunal said –

> "*The question is whether there was, as the Tribunal found, a one-off act which had continuing consequences; namely being subjected to further stages in the disciplinary process, or whether this was part of an act extending over a period.*
>
> *By taking the decision to instigate disciplinary procedures, it seems to me that the Respondent created a state of affairs that would continue until the conclusion of the disciplinary process. This is not merely a one-off act with continuing consequences. That much is evident from the fact that once the process is initiated, the Respondent would subject the Claimant to further steps under it from time to time. Alternatively, it may be said that each of the steps taken in accordance with the procedures is such that it cannot be said that those steps comprise "a succession of unconnected or isolated specific acts" as per the decision in* ***Hendricks****, paragraph 52*."

Submissions by claimant

37. The claimant submitted that his unequal treatment by the respondent had not been just his suspension but also the investigation, disciplinary action and ultimately dismissal. This amounted to an ongoing situation or state of affairs. He referred to

a number of paragraphs in the EAT's judgment in ***Hale*** including those quoted above.

Reply for respondent

38. Mr Hay argued that the claimant's assertions relating to the investigation, disciplinary action and dismissal took matters beyond the pleaded case. As pled, the case was not within the ambit of ***Hale***. Mr Hay pointed out that in ***Hale***, at paragraph 44, the EAT had said that a disciplinary process can encompass matters extending over a period. It did not necessarily do so.

Discussion and disposal

39. I did not believe it was appropriate to characterise the respondent's suspension of the claimant on 20 February 2019 as a one-off act with continuing consequences. I considered that it was more realistic to regard it as the first step in a disciplinary process in which there were subsequent steps – investigation, disciplinary hearing, dismissal. These were not *"a succession of unconnected or isolated specific acts"* but a continuing state of affairs. That "*state of affairs"* was the disciplinary process to which the claimant was subjected by the respondent. This was *"conduct extending over a period"* for the purposes of section 123(3)(a) EqA.

40. The consequence was that the claimant's claim of direct sex discrimination under section 13 EqA was not out of time.

41. It followed that the claimant's application for an extension of time was unnecessary and I did not require to deal with it.

Should the claimant's sex discrimination claim be struck out?

42. So far as relevant Rule 37 provides as follows –

"*(1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds –*

(a) that it is scandalous or vexatious or has no reasonable prospect of success…."

Submissions for respondent

43. Mr Hay recognised that strike out was a draconian step, to be sparingly exercised. He accepted that there was a "*higher test"* in discrimination cases and that there was a public policy interest in discrimination cases being heard.

44. However, Mr Hay argued, a Tribunal should not "*back off*" if a discrimination claim was within the "*ambit"* of strike out. He referred to ***Ahir v British Airways plc [2017] EWCA Civ 1392*** and in particular to the passages quoted at paragraphs 11 and 12 from the judgments in ***Anyanwu v South Bank Student Union [2001] UKHL 14***, ***Ezsias v North Glamorgan NHS Trust [2007] ICR 1126*** and ***Tayside Public Transport Company v Reilly [2012] CSIH 46***.

45. Mr Hay also referred to paragraph 16 in ***Ahir***. His point is perhaps best made by quoting from that paragraph (per Lord Justice Underhill) –

"*Employment Tribunals should not be deterred from striking out claims, including discrimination claims, which involve a dispute of fact if they are satisfied that there is indeed no reasonable prospect of the facts necessary to liability being established, and also provided they are keenly aware of the danger of reaching such a conclusion in circumstances where the full evidence has not been heard and explored, perhaps particularly in a discrimination context."*

46. Mr Hay did not dispute that there was a need to identify the difference in treatment of the claimant and his comparator. However, there was also the "*reason why*"

question. This involved an assessment of the thought process of the alleged discriminator. If a prima facie case was made out, the claimant had the benefit of section 136 EqA in terms of which the burden of proof shifted to the respondent.

47. Mr Hay referred to ***Madarassy v Nomura International plc [2007] ICR 867*** and in particular paragraphs 55 and 56 which quote from the decision in ***Igen Ltd v Wong [2005] ICR 931***. As I return to these paragraphs below I will set them out here –

"*55. In my judgment, the correct legal position is made plain in paras 28 and 29 of the judgment in* ***Igen Ltd v Wong***:

"*28. ….The language of the statutory amendments [to section 63A(2)] seems to us plain. It is for the complainant to prove the facts from which, if the amendments had not been passed, the employment tribunal could conclude, in the absence of an adequate explanation, that the respondent committed an unlawful act of discrimination. It does not say that the facts to be proved are those from which the employment tribunal could conclude that the respondent "could have committed" such act.*

29. The relevant act is, in a race discrimination case….that (a) in circumstances relevant for the purposes of any provision of the 1976 Act (for example in relation to employment in the circumstances specified in section 4 of the Act), (b) the alleged discriminator treats another person less favourably and (c) does so on racial grounds. All those facts are facts which the complainant, in our judgment, needs to prove on the balance of probabilities."

(The court then proceeded to criticise the Employment Appeal Tribunal for not adopting this construction and in regarding a "possibility" of discrimination by the complainant as sufficient to shift the burden of proof to the respondent.)

56. The court in ***Igen Ltd v Wong [2005] ICR 931*** *expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an*

unlawful act of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination."

48. Mr Hay submitted that the claimant had to show more than the difference of sex and the difference of treatment between himself and his comparator. It had to be something more than "*it could have been"* because of the protected characteristic. He contrasted the present case with the position in ***Hale*** where the "*something more"* was certain remarks allegedly made by the claimant's accusers which were identified as racial. As stated in paragraph 10 of the judgment in that case - "*It was contended by the claimant that the remarks had racial overtones given the context in which they were said."*

49. Mr Hay also referred to paragraphs 23 and 24 in ***Hale*** which contain quotations from the judgment of the Employment Tribunal in that case dealing with the difference in the treatment of the claimant in that case compared with the treatment of his accusers (their grievances against the claimant were investigated whereas the claimant's grievances against his accusers were not). The Tribunal said –

"*….this gives the impression of the respondent wanting to keep the claimant's grievance below the radar in order not to rock the boat of its fragile relationship with the BME. We consider this to be the "something more" that shifts the burden to the respondent to provide an explanation for the difference in treatment of the claimant…."*

50. Quoting from the claimant's particulars of claim Mr Hay argued that the claimant's assertion that there was "*no reasonable basis in fact or logic"* for the difference between his treatment and that of Ms Boyd was not enough. What was relevant in a direct discrimination claim was the subjective motivation of the alleged discriminator, not the objective test of "*no reasonable basis"*. There was, Mr Hay submitted, nothing in the claimant's particulars of claim to suggest why the difference of sex was the reason for any differential treatment. If Ms Boyd had

been a man, all of the claimant's averments (of difference in treatment) would be the same.

51. Mr Hay contended that the claimant's assertion of direct discrimination was in effect based on the "*accident"* of Ms Boyd being female and the claimant male. Referring to paragraph 324 of the claimant's particulars of claim (page 63), Mr Hay argued that the claimant's contention that the "*entire investigation, disciplinary and grievances processes"* were "*simply a pretence, the underlying intention of which was to secure the Claimant's dismissal"* showed that the case had nothing to do with Ms Boyd's sex. There was no taint of sex discrimination and this was a "*fundamental shortcoming"* in the claimant's section 13 claim. Even if the claimant proved everything which he was offering to prove in his particulars of claim he would not get close to identifying sex as the motivation for the respondent's treatment of him.

52. Under reference to ***Ladbroke Racing Ltd v Arnott 1981 SC 158*** Mr Hay submitted that while the claimant's comparator did not have to be a clone, section 23 EqA required that there should be "*no material difference"* between the circumstances of the claimant and the comparator. The claimant had been Ms Boyd's line manager. The difference in status, and not the difference in sex, explained the difference in treatment.

53. Mr Hay concluded by submitting that although strike out was a draconian step, the claimant's direct sex discrimination claim had no reasonable prospect of success and should be struck out under Rule 37(1)(a). The claimant would still have his unfair dismissal claim which was, Mr Hay argued, the "*appropriate vehicle for determination of the dispute between the parties*".

Submissions by claimant

54. The claimant argued that Ms Boyd was an appropriate comparator. After referring to the tasks which were unique to her as opposed to the claimant (financial aspects and fortnightly file audit) he referred to elements which they both undertook in

relation to court expenses. These involved drawing cash from the respondent's petty cash, taking this to the court, obtaining a receipt and passing the receipt to whoever had provided the cash. The claimant said that this was relevant because he had been accused of misappropriation of funds, and obtaining and uttering false receipts. In relation to the activities which underpinned these accusations, there was no material difference between what the claimant and Ms Boyd did. The claimant drew support from ***Home Office v Saunders [2006] ICR 318***.

55. The claimant submitted that ***Ladbroke Racing*** should be distinguished from the present case. In ***Ladbroke Racing*** the claimants had been acting under the instruction or with the knowledge of their superiors. In the present case the claimant believed that neither he nor Ms Boyd had acted fraudulently, but if there had been any wrongdoing by Ms Boyd, she had not been acting under the claimant's instruction but on her own. The purpose of the comparison with Ms Boyd, the claimant said, was to assist the Tribunal to understand if the reason for the difference of treatment flowed from the protected characteristic. The claimant also argued that his sex discrimination claim did not necessarily fail if the Tribunal found that Ms Boyd was not an appropriate comparator since there could be a hypothetical comparator.

56. Addressing the "*because of a protected characteristic*" point, a reference to the language of section 13 EqA, the claimant referred to the audit/investigation which the respondent had instructed after his suspension. This had not been restricted to court expenses in which the claimant had been involved but covered all expenses in the relevant period. Thereafter it was not possible to distinguish between the claimant and Ms Boyd, and this led to her giving evidence at the first disciplinary hearing on 25 April 2019.

57. The claimant referred to ***Network Rail Infrastructure Ltd v Griffiths-Henry 2006 IRLR 865*** as an example of where a prima facie case of direct discrimination had been made out and ***Madarassy*** as an example of where it had not. He argued that the present case was closer to ***Network Rail*** because the facts (ie what was

alleged in the particulars of claim) provided a causal link between the difference of sex and the difference of treatment.

58. The claimant referred to the passage from the judgment in ***Anyanwu*** (Lord Steyn at paragraph 24) quoted in ***Ahir*** (at paragraph 11) –

> "*For my part such vagaries in discrimination jurisprudence underline the importance of not striking out such claims as an abuse of the process except in the most obvious and plainest cases. Discrimination cases are generally fact-sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest."*

59. The claimant argued that strike out should only happen in the clearest cases and that high threshold had not been met in the present case. The claimant submitted that he had presented facts from which an inference of discrimination could be drawn and accordingly the burden of showing a non-discriminatory explanation shifted to the respondent under section 136 EqA.

Reply for respondent

60. Mr Hay argued that his challenge to the aptness of Ms Boyd as the claimant's comparator illustrated the difficulty in finding why the difference in treatment was due to the difference in sex. The fundamental question was the "*reason why"*, per ***Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11***. According neither ***Saunders*** nor ***Network Rail*** provided assistance. Mr Hay observed that ***Madarassy*** was a decision of the Court of Appeal whereas ***Network Rail*** was decided in the EAT.

61. Mr Hay argued that there was nothing in the claimant's particulars of claim to indicate what was the "*something more"* which was required beyond the difference

in treatment and difference in sex. It was the "*missing element"* so that strike out was appropriate.

Discussion and disposal

62. My starting point in considering the respondent's application to strike out the claimant's direct sex discrimination claim was to remind myself of the terms of Rule 37. I had to be satisfied that this claim had *"no reasonable prospect of success".* While not setting the bar as high as in an earlier version of the Rules when it was "*no prospect of success"*, it was a higher test than the one for a deposit order in Rule 39 – *"little reasonable prospect of success".*

63. I also reminded myself that the strike out of a claim without evidence being heard should only be ordered in *"exceptional"* (per Maurice Kay LJ in ***Ezsias*** at paragraph 29) or "*most exceptional"* (per the Lord Justice Clerk in ***Tayside Public Transport*** at paragraph 30) circumstances. The Lord Justice Clerk also said (again at paragraph 30) "*….where there is a "crucial core of disputed facts", it is an error of law for the tribunal to pre-empt the determination of a full hearing by striking out".* That was said in the context of an unfair dismissal claim but in my view applies with equal if not greater force in a discrimination claim where there are considerations of public interest (see paragraph 58 above).

64. I looked at the claimant's particulars of claim and the respondent's grounds of resistance to see if there was a *"crucial core of disputed facts"* in respect of the claimant's direct sex discrimination claim. I found that it was not in dispute that –

- The claimant was suspended on 20 February 2019 while Ms Boyd was not (and was not thereafter subject to the action taken by the respondent in respect of the claimant).

- An audit/investigation was instructed by the respondent.

- An investigating officer was appointed on 7 March 2019, carried out an investigation and produced a report on 12 April 2019.

- The claimant lodged a grievance on 12 April 2019 and a supplementary grievance on 14 April 2019.

- A disciplinary hearing took place on 25 April 2019 with continued hearings on 9 May 2019 and 15 May 2019.

- A further continued hearing took place on 20 May 2019 at which the claimant was summarily dismissed.

65. While the claimant clearly found much with which to disagree in relation to the disciplinary process, I found no *"crucial core of disputed facts"* in respect of his direct sex discrimination claim. None of the matters listed in the preceding paragraph was challenged in the respondent's grounds of resistance nor queried in Mr Hay's submissions.

66. I was satisfied that, for the claimant's direct sex discrimination claim to have a prospect of success, he had to show "*something more"* than the difference of treatment and the difference of sex. This was what the Court of Appeal said in ***Madarassy*** (see paragraph 47 above). An example of what might amount to "*something more"* was the "*the respondent wanting to keep the claimant's grievance below the radar in order not to rock the boat of its fragile relationship with the BME"* in ***Hale*** (see paragraph 49 above).

67. In ***Network Rail*** the need for "*something more"* was recognised. The EAT said at paragraph 15 –

> "*It is submitted that the mere fact that she is a black woman and the others are white men and that she was not appointed could not constitute sufficient primary facts to justify an inference of discrimination. We would accept that those mere facts would not do so."*

The EAT went on to identify the matters which the Tribunal had been entitled to regard as "*something more".* These were defects in the assessment carried out by the person who had selected the claimant for redundancy in comparison with her white colleagues.

68. Again, I found nothing in the claimant's particulars of claim which constituted "*something more"* than the difference of treatment and difference of sex as between him and his comparator. For the claimant to succeed, the treatment about which he complained had to be *"because of a protected characteristic"* in terms of section 13 EqA. I agreed with Mr Hay's submission that this was the *"missing element"* in this case. In the absence of anything which even hinted that the difference of sex had been the reason for the respondent treating the claimant differently from Ms Boyd, I did not consider that his direct sex discrimination claim had any reasonable prospect of success. Put another way, even if the claimant proved everything he averred in his particulars of claim, it would not be possible for a Tribunal to find that his treatment by the respondent was because he was male and Ms Boyd was female.

69. Accordingly, I decided that this was an "*exceptional"* case in which the claimant's claim of discrimination had no reasonable prospect of success and that this claim should be struck out under Rule 37(1)(a).

70. In view of this, I did not require to deal with the claimant's application for further and better particulars of the respondent's response to his sex discrimination claim.

Should parts of the respondent's response to the claimant's unfair dismissal claim be struck out as having no reasonable prospect of success?

71. The narration of the claimant's unfair dismissal claim in his particulars of claim was arranged into five grounds which I summarise briefly as follows –

- Ground 1 – the involvement of the investigating officer, Mr Brownridge, in the disciplinary hearing on 25 April 2019.

- Ground 2 – the denial of access to departmental files and emails.

- Ground 3 – the failure to provide the claimant timeously with details of evidence obtained by the respondent from Mr B Mowatt, Ms H Anderson and Mr R Loftin (and also the failure to provide adequate details of evidence obtained from Mr A McKay and Ms R Cameron).

- Ground 4 – that the evidence established that the claimant had not acted improperly.

- Ground 5 – the finding in relation to the Fowler case when this did not form part of the allegations against the claimant.

Submissions by claimant

72. The claimant argued that in their ET3 the respondent had offered no defence to grounds 1, 2, 3 and 5 in his particulars of claim. He referred to the guidance on the Employment Tribunals' website which stated that where there were multiple issues, the grounds of resistance should explain the basis of resistance of those issues one by one.

73. The claimant referred to ***Polkey v A E Dayton Services Ltd [1998] ICR 142*** to support his argument that procedural irregularities can lead to a finding of unfair dismissal. In anticipation that Mr Hay would rely on ***Taylor v OCS Group Ltd [2006] ICR 1602***, the claimant acknowledged that this case indicated that procedural defects should not be dealt with in isolation and that the whole circumstances should be considered. However, where those defects were substantial rather than minor, the Tribunal had to consider their impact and the tainting of the proceedings as a whole.

Submissions for respondent

74. Mr Hay submitted that these were not civil pleadings. It was not a case where the respondent's position could be gleaned only from the ET3. There was a substantial investigation report, substantial reasons for dismissal and substantial reasons for the appeal decision.

75. Mr Hay argued that ***Polkey*** was not authority for the proposition that procedural shortcomings led to unfairness. It was not a "*box-ticking exercise*". ***Taylor*** indicated that the Tribunal should look at matters in the round and make an assessment of the impact of the procedural shortcoming on the fairness of the decision to dismiss.

76. Mr Hay accepted that the respondent's pleadings in the grounds of resistance were brief but denied that this amounted to any concession that the claimant's dismissal had been unfair. If the claimant needed more to understand better the respondent's answer to his unfair dismissal claim, he could ask for it.

Discussion and disposal

77. This was an application for strike out. Rule 37(1)(a) was not engaged unless the response had no reasonable prospect of success. While the respondent's grounds of resistance did not attempt to answer every point in the particulars of claim, they did set out a statable answer to the claimant's unfair dismissal claim including a narration of the reasons for dismissal. I did not consider that the response could be said to have no reasonable prospects of success and I decided to refuse the claimant's application for strike out.

Further procedure

78. It was agreed at the hearing that, irrespective of how I determined the issues, a further preliminary hearing for the purpose of case management would be required

to discuss arrangements for the final hearing. This has been set for 31 March 2020.

Date of Judgment: 14 January 2020
Employment Judge: W A Meiklejohn
Entered Into the Register: 20 January 2020
And Copied to Parties